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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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6
RITA L. JARVIS,

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Plaintiff,

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vs.

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COMMISSIONER OF SOCIAL
10 SECURITY,

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Defendant.

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Case No. 8:15-cv-01628 (VEB)

13
DECISION AND ORDER

14
I. INTRODUCTION

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In July of 2012, Plaintiff Rita Jarvis applied for disability insurance benefits
16 under the Social Security Act. The Commissioner of Social Security denied the
17 application.

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Plaintiff, by and through her attorneys, the Law Offices of Martin Taller,
19 APC, Troy Dana Monge, Esq. of counsel, commenced this action seeking judicial

1 review of the Commissioner's denial of benefits pursuant to 42 U.S.C. §§ 405 (g)
2 and 1383 (c)(3).

3 The parties consented to the jurisdiction of a United States Magistrate Judge.
4 (Docket No. 10, 13). On May 2, 2016, this case was referred to the undersigned
5 pursuant to General Order 05-07. (Docket No. 18).

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7 **II. BACKGROUND**

8 Plaintiff applied for benefits on July 25, 2012, alleging disability beginning
9 January 30, 2012, due to various impairments. (T at 170-71).¹ The application was
10 denied initially and on reconsideration. Plaintiff requested a hearing before an
11 Administrative Law Judge ("ALJ").

12 On May 14, 2014, a hearing was held before ALJ Helen Hesse. (T at 30).
13 Plaintiff appeared with her attorney and testified. (T at 33-59). The ALJ also
14 received testimony from Dr. David Rinehart, a vocational expert (T at 59-63).

15 On June 24, 2014, the ALJ issued a written decision denying the application
16 for benefits. (T at 10-29). The ALJ's decision became the Commissioner's final
17 decision on August 17, 2016, when the Appeals Council denied Plaintiff's request
18 for review. (T at 1-6).

19 ¹Citations to ("T") refer to the administrative record at Docket No. 16.

1 On October 9, 2015, Plaintiff, acting by and through her counsel, filed this
2 action seeking judicial review of the Commissioner's denial of benefits. (Docket No.
3 1). The Commissioner interposed an Answer on December 14, 2015. (Docket No.
4 15). The parties filed a Joint Stipulation on February 17, 2016. (Docket No. 17).

5 After reviewing the pleadings, Joint Stipulation, and administrative record,
6 this Court finds that the Commissioner's decision must be reversed and this case be
7 remanded for further proceedings.

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9 III. DISCUSSION

10 **A. Sequential Evaluation Process**

11 The Social Security Act ("the Act") defines disability as the "inability to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which has
14 lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
16 claimant shall be determined to be under a disability only if any impairments are of
17 such severity that he or she is not only unable to do previous work but cannot,
18 considering his or her age, education and work experiences, engage in any other
19 substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),

1 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
2 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential evaluation process
4 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step
5 one determines if the person is engaged in substantial gainful activities. If so,
6 benefits are denied. 20 C.F.R. §§ 404. 1520(a)(4)(i), 416.920(a)(4)(i). If not, the
7 decision maker proceeds to step two, which determines whether the claimant has a
8 medially severe impairment or combination of impairments. 20 C.F.R. §§
9 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

10 If the claimant does not have a severe impairment or combination of
11 impairments, the disability claim is denied. If the impairment is severe, the
12 evaluation proceeds to the third step, which compares the claimant's impairment(s)
13 with a number of listed impairments acknowledged by the Commissioner to be so
14 severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii),
15 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or
16 equals one of the listed impairments, the claimant is conclusively presumed to be
17 disabled. If the impairment is not one conclusively presumed to be disabling, the
18 evaluation proceeds to the fourth step, which determines whether the impairment
19 prevents the claimant from performing work which was performed in the past. If the

1 claimant is able to perform previous work, he or she is deemed not disabled. 20
2 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual
3 functional capacity (RFC) is considered. If the claimant cannot perform past relevant
4 work, the fifth and final step in the process determines whether he or she is able to
5 perform other work in the national economy in view of his or her residual functional
6 capacity, age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
7 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

8 The initial burden of proof rests upon the claimant to establish a *prima facie*
9 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
10 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
11 is met once the claimant establishes that a mental or physical impairment prevents
12 the performance of previous work. The burden then shifts, at step five, to the
13 Commissioner to show that (1) plaintiff can perform other substantial gainful
14 activity and (2) a “significant number of jobs exist in the national economy” that the
15 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

16 **B. Standard of Review**

17 Congress has provided a limited scope of judicial review of a Commissioner's
18 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner's decision,
19 made through an ALJ, when the determination is not based on legal error and is

1 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir.
 2 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

3 “[The Commissioner’s] determination that a plaintiff is not disabled will be
 4 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*
 5 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial
 6 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
 7 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d
 8 599, 601-02 (9th Cir. 1989). Substantial evidence “means such evidence as a
 9 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
 10 *Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch inferences and
 11 conclusions as the [Commissioner] may reasonably draw from the evidence” will
 12 also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review,
 13 the Court considers the record as a whole, not just the evidence supporting the
 14 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.
 15 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

16 It is the role of the Commissioner, not this Court, to resolve conflicts in
 17 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
 18 interpretation, the Court may not substitute its judgment for that of the
 19 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th

1 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be
2 set aside if the proper legal standards were not applied in weighing the evidence and
3 making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d
4 432, 433 (9th Cir. 1987). Thus, if there is substantial evidence to support the
5 administrative findings, or if there is conflicting evidence that will support a finding
6 of either disability or non-disability, the finding of the Commissioner is conclusive.
7 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

8 **C. Commissioner's Decision**

9 The ALJ determined that Plaintiff had not engaged in substantial gainful
10 activity since January 30, 2012, the alleged onset date, and met the insured status
11 requirements of the Social Security Act through September 30, 2015 (the "date last
12 insured"). (T at 15). The ALJ found that Plaintiff's degenerative disc disease of the
13 cervical spine; degenerative disc disease of the lumbar spine; fibromyalgia; chronic
14 fatigue syndrome; status post bilateral carpal tunnel release surgeries; osteoarthritis
15 of the hands and feet; obesity; and asthma were "severe" impairments under the Act.
16 (Tr. 15).

17 However, the ALJ concluded that Plaintiff did not have an impairment or
18 combination of impairments that met or medically equaled one of the impairments
19 set forth in the Listings. (T at 17).

1 The ALJ determined that Plaintiff retained the residual functional capacity
2 (“RFC”) to perform less than a full range of light work as defined in 20 CFR §
3 404.1567 (b). In particular, the ALJ found that Plaintiff could: sit for 6 hours in an
4 8-hour workday; stand or walk 6 hours in an 8-hour workday, with normal breaks;
5 occasionally lift 20 pounds, frequently lift 10 pounds; occasionally climb stairs,
6 bend, balance, stoop, kneel, crouch, and crawl, but was precluded from climbing
7 ladders, ropes, or scaffolds; and could use both upper extremities on a frequent, but
8 not constant, basis. The ALJ found that Plaintiff was precluded from working
9 around unprotected heights and needed to avoid concentrated exposure to cold,
10 wetness, dust, fumes, gases, or chemicals. (T at 18).

11 The ALJ concluded that Plaintiff could perform her past relevant work as a
12 commercial property manager, real estate branch manager, executive assistant,
13 administrative assistant, and mobile home salesperson. (T at 23).

14 Accordingly, the ALJ determined that Plaintiff was not disabled within the
15 meaning of the Social Security Act between January 30, 2012 (the alleged onset date
16 date) and June 24, 2014 (the date of the decision) and was therefore not entitled to
17 benefits. (T at 23-24). As noted above, the ALJ’s decision became the
18 Commissioner’s final decision when the Appeals Council denied Plaintiff’s request
19 for review. (T at 1-6).

D. Disputed Issues

As set forth in the Joint Stipulation (Docket No. 17, at p. 2), Plaintiff offers two (2) main arguments in support of her claim that the Commissioner's decision should be reversed. First, Plaintiff argues that the ALJ's assessment of the medical opinion evidence was flawed. Second, she challenges the ALJ's credibility determination. This Court will address both arguments in turn.

IV. ANALYSIS

A. Medical Opinion Evidence

In disability proceedings, a treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion is given more weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

1 The courts have recognized several types of evidence that may constitute a
2 specific, legitimate reason for discounting a treating or examining physician's
3 medical opinion. For example, an opinion may be discounted if it is contradicted by
4 the medical evidence, inconsistent with a conservative treatment history, and/or is
5 based primarily upon the claimant's subjective complaints, as opposed to clinical
6 findings and objective observations. *See Flaten v. Secretary of Health and Human*
7 *Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995).

8 An ALJ satisfies the "substantial evidence" requirement by "setting out a
9 detailed and thorough summary of the facts and conflicting clinical evidence, stating
10 his interpretation thereof, and making findings." *Garrison v. Colvin*, 759 F.3d 995,
11 1012 (9th Cir. 2014)(quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998)).
12 "The ALJ must do more than state conclusions. He must set forth his own
13 interpretations and explain why they, rather than the doctors', are correct." *Id.*

14 In May of 2014, Dr. Naguib Bebawi, Plaintiff's treating physician, provided a
15 physical residual functional assessment. Dr. Bebawi explained that he had been
16 treating Plaintiff since June of 2011. He noted that Plaintiff suffered from several
17 serious conditions, with chronic fibromyalgia as her primary diagnosis. (T at 719).
18 Dr. Bebawi opined that Plaintiff could not lift or carry more than 5-10 pounds, could
19 not stand for more than 2 hours in an 8-hour day, could not walk more than 2 hours,

1 could not sit more than 2 hours, and could not push/pull for more than 2 hours per
2 working day. (T at 720). Dr. Bebawi stated that he believed Plaintiff was
3 “permanently and totally disabled for any type of job.” (T at 720).

4 The ALJ gave “little weight” to Dr. Bebawi’s opinion, finding it “overly
5 restrictive given [Plaintiff’s] positive response to both conservative care and surgical
6 intervention.” (T at 22). In addition, the ALJ concluded that Dr. Bebawi’s
7 assessment was contradicted by treatment notes showing normal gait, full cervical
8 range of motion, mildly reduced lumbar range of motion, full strength, intact motor
9 function, and lessened pain symptoms with medication management. (T at 22).

10 For the following reasons, this Court finds that the ALJ did not adequately
11 develop the record and a remand is accordingly required.

12 There is no question that “the ALJ has a duty to assist in developing the
13 record.” *Armstrong v. Commissioner of Soc. Sec. Admin.*, 160 F.3d 587, 589 (9th
14 Cir. 1998); 20 C.F.R. §§ 404.1512(d)-(f); *see also Sims v. Apfel*, 530 U.S. 103, 110-
15 11, 147 L. Ed. 2d 80, 120 S. Ct. 2080 (2000) (“Social Security proceedings are
16 inquisitorial rather than adversarial. It is the ALJ’s duty to investigate the facts and
17 develop the arguments both for and against granting benefits . . .”).

18 One of the tools the ALJ has to develop the record is the ability to order a
19 consultative examination, *i.e.*, “a physical or mental examination or test purchased
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1 for [a claimant] at [the Commissioner's] request and expense." 20 C.F.R. §§
2 404.1519, 416.919. The ALJ's duty to develop the record further is triggered when
3 there is ambiguous evidence or when the record is inadequate to allow for proper
4 evaluation of the evidence. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.
5 2001).

6 In addition, the Ninth Circuit has directed caution with regard to claims
7 involving fibromyalgia, a disease noted for its lack of objective diagnostic findings.
8 In particular, the Ninth Circuit has recognized that "fibromyalgia's cause or causes
9 are unknown, there is no cure, and, of greatest importance to disability law, its
10 symptoms are entirely subjective. There are no laboratory tests for the presence or
11 severity of fibromyalgia." *Rollins v. Massanari*, 261 F.3d 853, 855 (9th Cir. 2001)
12 (quoting *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996)).

13 In other words, "the absence of swelling joints or other orthopedic and
14 neurologic deficits 'is no more indicative that the patient's fibromyalgia is not
15 disabling than the absence of a headache is an indication that a patient's prostate
16 cancer is not advanced.'" *Green-Younger v. Barnhart*, 335 F.3d 99, 109 (2d Cir.
17 2003) (quoting *Sarchet*, 78 F.3d at 307).

18 This Court finds that the ALJ erred in the present case by "effectively
19 requir[ing] objective evidence for a disease that eludes such measurement." *Benecke*

1 *v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004) (quoting *Green-Younger*, 335 F.3d at
2 108). If the ALJ had addressed this concern and offered an explanation for her
3 decision, supported by substantial evidence, this Court would have been bound to
4 accept that explanation. However, it does not appear that the ALJ exercised the
5 requisite caution when considering this issue.

6 Moreover, there were substantial reasons for crediting Dr. Bebawi's
7 assessment. Dr. Bebawi had a lengthy treating relationship with Plaintiff, lasting
8 nearly three (3) years as of the date of his report. (T at 719). Treatment notes
9 described Plaintiff as suffering from hip pain, using a walker, and experiencing
10 chronic fatigue and hand tremors. (T at 400). She had limited range of motion in her
11 right hip. (T at 402). Plaintiff was assessed as having chronic pain, shortness of
12 breath, and acute L5 radiculopathy. (T at 408). Her gait was described as "limping"
13 and she was noted to be "using a wheelchair to transfer." (T at 416). Plaintiff
14 experienced crepitus (a crackling or rattling sound) and limited range of motion in
15 both knees and needed a walker. (T at 425).

16 It appears the ALJ considered having a medical expert testify at the
17 administrative hearing – the curriculum vitae of two such experts (Dr. Arvin Klein
18 and Dr. Ruben Beezy) are included in the record. (T at 120, 156). However, no such
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1 expert(s) were called and the ALJ did not refer Plaintiff for a consultative
2 examination.

3 As outlined above, given the ambiguous nature of the evidence and light of
4 the particular concerns raised by fibromyalgia, it was error to not seek the input of a
5 consultative examiner and/or the testimony of a medical expert. Instead, the ALJ
6 relied heavily on the opinions of non-examining State Agency review consultations
7 (Dr. Spinka and Dr. Ramsey). (T at 22-23, 66-76, 78-90). However, the opinion of a
8 non-examining, State Agency physician does not, without more, justify the rejection
9 of an examining physician's opinion. *Lester v. Chater*, 81 F.3d 821, 831 (9th Cir.
10 1995)(citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990)). Moreover,
11 the State Agency review consultants rendered their opinions in November of 2012
12 and June 2013, respectively. As such, they did not have the benefit of reviewing Dr.
13 Bebawi's May 2014 assessment.

14 For the foregoing reasons, this Court finds that the record was not adequately
15 developed and the ALJ's decision to afford little weight to Dr. Bebawi's opinion
16 therefore cannot be sustained.

17 **B. Credibility**

18 A claimant's subjective complaints concerning his or her limitations are an
19 important part of a disability claim. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
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1 1190, 1195 (9th Cir. 2004)(citation omitted). The ALJ's findings with regard to the
2 claimant's credibility must be supported by specific cogent reasons. *Rashad v.*
3 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of
4 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear
5 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
6 findings are insufficient: rather the ALJ must identify what testimony is not credible
7 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;
8 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

9 However, subjective symptomatology by itself cannot be the basis for a
10 finding of disability. A claimant must present medical evidence or findings that the
11 existence of an underlying condition could reasonably be expected to produce the
12 symptomatology alleged. See 42 U.S.C. §§423(d)(5)(A), 1382c (a)(3)(A); 20 C.F.R.
13 § 404.1529(b), 416.929; SSR 96-7p.

14 In this case, Plaintiff testified as follows:

15 She was 51 years old as of the hearing, weighing 260 pounds, and standing
16 approximately 5 feet, 5 inches tall. (T at 33). She completed high school and
17 obtained a bachelor's degree. (T at 33). She attended real estate school and obtained
18 a real estate license. (T at 35). She is divorced and lives alone. (T at 36). She last
19 worked in January of 2011, when she was laid off. (T at 36). Most days, she

1 experiences extreme pain or lethargy, has difficulties with her hands, has trouble
2 sitting for prolonged periods, and is chronically fatigued. (T at 38). She has
3 significant pain in her spine and legs, along with stabbing nerve pain and difficulty
4 breathing. (T at 38). She has trouble sleeping. (T at 39). She had a varied career,
5 including selling mobile homes, computer repair, and property management. (T at
6 39-40). She does not own a car and rarely drives. (T at 41). Physical activity leads
7 fairly quickly to exhaustion. (T at 42). She enjoys reading and attends religious
8 services on-line. (T at 43-44). She has had four surgeries. (T at 46).

9 She does her grocery shopping using a riding “push buggy.” (T at 49). She
10 gets about three hours of sleep most nights and has difficulty getting out of bed in
11 the morning. (T at 50). She attempts light chores, watches television, and rests
12 periodically throughout the day. (T at 51). Bathing is difficult due to pain. (T at 52).
13 She can stand for approximately 30 minutes and experiences pain upon prolonged
14 sitting. (T at 53-54). Medication helps with the pain, but makes her “loopy.” (T at
15 55). She avoids stairs. (T at 55). She can carry a gallon of milk from the car to the
16 house. (T at 55-56). Her pain is getting worse. (T at 56).

17 The ALJ concluded that Plaintiff’s medically determinable impairments could
18 reasonably be expected to cause the alleged symptoms, but that her statements
19 regarding the intensity, persistence, and limiting effects of the symptoms were not

1 fully credible. (T at 21). This Court finds that the ALJ's assessment cannot be
2 sustained.

3 First, the evidence was less clear than the ALJ indicated. For example, the
4 ALJ describes Plaintiff's treatment as "conservative," although she has had surgery
5 for carpal tunnel release and may need additional procedures. (T at 719, 727-30).
6 The ALJ referenced records describing Plaintiff's gait as normal, but there were also
7 indication of abnormal gait and the use of a cane and walker. (T at 377, 425, 545).
8 Second, and most importantly, Plaintiff's subjective testimony was supported by Dr.
9 Bebawi's opinion, which the ALJ improperly discounted for the reasons outlined
10 above. Third, Plaintiff has an excellent work record, which should have been
11 considered when weighing the credibility of her claims, but was not. *Pazos v.*
12 *Astrue*, No. 08-6882, 2009 U.S. Dist. LEXIS 33970, at *29 (Cal. C.D. Mar. 30,
13 2009).

14 **C. Remand**

15 In a case where the ALJ's determination is not supported by substantial
16 evidence or is tainted by legal error, the court may remand the matter for additional
17 proceedings or an immediate award of benefits. Remand for additional proceedings
18 is proper where (1) outstanding issues must be resolved, and (2) it is not clear from

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1 the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379
2 F.3d 587, 593 (9th Cir. 2004).

3 In this case, the ALJ should have developed the record further for the reasons
4 outlined above. In particular, the ALJ should have obtained a consultative
5 examination and/or the testimony of a medical expert. However, it is not clear from
6 the record before this Court that Plaintiff is disabled. Her treatment was *generally*
7 conservative and there were numerous *generally* normal clinical examinations.
8 Although caution and further development of the record are required (particularly
9 because of the fibromyalgia diagnosis), the evidence is ambiguous as to whether
10 Plaintiff is actually disabled and a remand for further proceedings is therefore the
11 appropriate remedy.

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V. ORDERS

IT IS THEREFORE ORDERED that:

Judgment be entered REVERSING the Commissioner's decision and REMANDING this action for further proceedings, and it is further ORDERED that

The Clerk of the Court shall file this Decision and Order, serve copies upon counsel for the parties, and CLOSE this case, without prejudice to a timely application for attorneys' fees.

DATED this 1st day of June, 2016.

/s/Victor E. Bianchini
VICTOR E. BIANCHINI
UNITED STATES MAGISTRATE JUDGE